

## REMARKS

Applicant respectfully requests reconsideration of the present application in view of the foregoing amendments and in view of the reasons which follow.

This amendment adds, changes and/or deletes claims in this application. A detailed listing of all claims that are, or were, in the application, irrespective of whether the claim(s) remain under examination in the application, are presented, with an appropriate defined status identifier.

Claims 1-5, 8-11, and 13-23 are pending in the present application. Claims 2-5, 14-15, 18, and 20 are being amended. Support for amended claims 2-5, 14-15, 18, and 20 may be found in the originally filed claims and specification. No new matter is added by this Amendment.

### **I. 35 U.S.C. § 112 Rejection of Claims 1-5, 8-11, and 13-23**

In section 4 of the Office Action, the Examiner rejected independent claims 1 and 16, and dependent claims 2-5, 8-11, 13-15, and 17-23 as indefinite because of the use of the term "mixtures thereof" and "combinations thereof" in independent claims 1 and 16, respectively. However, applicant respectfully traverses the rejection because, while broadening the scope of the claims, this language does not render the claims indefinite. For example, the first Markush group appearing in claim 1 reads "an amino acid selected from the group consisting of lysine, aspartic acid, and mixtures thereof." This limitation encompasses one of the two amino acids by itself, or any combination of the two. A claim that is clear in its scope is not indefinite regardless of the breadth of the claim. MANUAL OF PATENT EXAMINING PROCEDURE (MPEP) § 2173.04 (8th ed. 2003). The use of language such as "mixtures thereof" was recently endorsed by the Federal Circuit. *Abbott Labs., v. Baxter Healthcare Corp.*, 2003 U.S. App. LEXIS 13507 (2003) ("If a patentee desires mixtures or combinations of the members of the Markush group, the patentee *would need to add qualifying language while drafting the claim*")(emphasis added). The court then cited, with approval, a reference to use of the language "mixtures thereof." *Id.*, (Citing, *Meeting Held to Promote Uniform Practice in the Chemical Divisions*, 28 J. PAT. & TRADEMARK OFF. SOC'Y 849, 852 (1946),

which endorsed the use of language such as “mixtures thereof”). Accordingly, independent claims 1 and 16 and corresponding dependent claims 2-5, 8-11, 13-15, and 17-23 are not indefinite for use of the terms “mixtures thereof” and “combinations thereof.” Applicant respectfully requests that the Examiner reconsider the rejection under 35 U.S.C. § 112.

In section 4 of the Office Action, the Examiner also rejected independent claims 1 and 16, and dependent claims 2-5, 8-11, 13-15, and 17-23 as indefinite because independent claims 1 and 16 do not recite relative amounts of the amino acid, the metal oxide, and the organic acid in the composition. However, applicant respectfully traverses the rejection because, while the absence of any amounts in these claims makes the claims broad, it does not render the claims indefinite. See, MPEP § 2173.04 (8th ed. 2003). These claims currently embrace any composition containing at least some of each of the three components, and added in an amount between 0.001% and 2% (w/w) of the food product. Accordingly, independent claims 1 and 16 and corresponding dependent claims 2-5, 8-11, 13-15, and 17-23 are not indefinite for failing to recite relative amounts of the amino acid, the metal oxide, and the organic acid in the composition. Applicant respectfully requests that the Examiner reconsider the rejection under 35 U.S.C. § 112.

In section 5 of the Office Action, the Examiner rejected Claims 2-5, and 14-15, as indefinite because of a lack of a proper antecedent basis. Claims 2-5, and 14-15 have been amended to replace the word “ion” with the word “oxide.” Therefore, there is now a proper antecedent basis for the relevant limitations in claims 2-5 and 14-15. Applicant respectfully requests that the Examiner reconsider the rejection under 35 U.S.C. § 112.

## **II. Other Amendments to the Claims**

Dependant claims 3, 5, 18, and 20 are being amended to replace the term “carboxylic acid” with “organic acid.” Although no rejection was issued by the Examiner, this amendment was made because claims 1 and 16, from which claims 3, 5, 18, and 20 depend, recite the term “organic acid.”

**CONCLUSION**

Applicant believes that the present application is now in condition for allowance. Favorable reconsideration of the application as amended is respectfully requested. The Examiner is invited to contact the undersigned by telephone if it is felt that a telephone interview would advance the prosecution of the present application.

Respectfully submitted,

Date

09/09/03

By

M. Scott McBride

FOLEY & LARDNER  
Suite 3800  
777 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202-5306  
Telephone: (414) 297-5529  
Facsimile: (414) 297-4900

M. Scott McBride  
Attorney for Applicant  
Registration No. 52,008